

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 19, 2007

IN RE E.E.S.

**Appeal from the Juvenile Court for Knox County
No. 75225 Timothy E. Irwin, Judge**

No. E2007-01398-COA-R3-PT - FILED JANUARY 30, 2008

This is a parental rights termination case. The Department of Children's Services ("DCS") filed a petition to terminate the parental rights of V.D.H. ("Mother")¹ as to her son, E.E.S.² The juvenile court granted the petition and Mother appealed. We hold that the evidence does not preponderate against the juvenile court's finding, said by that court to have been made by clear and convincing evidence, that termination of Mother's parental rights is in the best interest of the child. Accordingly, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

John W. Routh, Knoxville, Tennessee, for the appellant, V.D.H.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

¹Mother advised the juvenile court that she preferred to be addressed by her maiden name instead of her married name. The trial court agreed to the request. We also will use the initial "H" representing her maiden name.

²To protect the anonymity of the minor child, we refer to all parties by their initials.

OPINION

I.

E.E.S. was born to Mother and her husband (“Father”) in Knox County on August 15, 2002. Sometime thereafter, but prior to the events in this case, Father was deported to Mexico following the disposition of a domestic violence charge. His parental rights are not at issue in this case.³

On the morning of October 16, 2005, the child, then three years old, was found wandering unattended near a dangerous Knoxville intersection. Law enforcement officers and DCS searched for Mother for over two hours. When Mother could not be located, E.E.S. was taken into the protective custody of DCS and contact information for Mother was left in three places: in a door at her home, with a neighbor, and with the child’s daycare provider.

After Mother presented herself to authorities, she initially claimed that she had left for work during the pre-dawn hours, believing that her live-in boyfriend would watch the child. According to Mother’s first explanation, the boyfriend then left for work without checking on E.E.S. Mother claimed that when she returned home later that morning, she did not become aware of any of the contact information. Although she was, in fact, notified by the neighbors that the police had taken her son, she failed to inquire about his welfare until the next day.

Mother later admitted, however, that after arguing with her boyfriend, she had left the residence – and the child – because she did not feel safe. Because E.E.S. had been born drug exposed, coupled with the fact that the child had been found unattended, DCS inquired about Mother’s drug use. Mother admitted that she had been using marijuana and had been taking pills from her sister’s Xanax prescription. The following day, the juvenile court granted DCS’s petition for temporary legal custody of E.E.S. The child was placed by DCS in foster care with Mother’s cousin, B.W.,⁴ in whose home E.E.S. had attended daycare. Mother’s sister lived next door to the child’s foster home. The case manager noted that the child was placed with B.W. “where he would be with family.” According to the record, however, Mother’s visitations were sporadic and short-lived prior to the filing by DCS of the petition to terminate.

DCS drafted a permanency plan on November 2, 2005, which required Mother to do the following: (1) complete and follow the recommendations of an alcohol and drug assessment; (2) resolve outstanding legal issues and incur no further criminal charges; (3) cooperate with DCS and the court; and (4) pay child support. Mother signed the plan, indicating that she had participated in its development, that it had been discussed with her, that she agreed with it, and that she had been

³The petition to terminate parental rights states that “[t]ermination of the father’s parental rights will be pursued through independent proceedings.”

⁴One court order refers to the foster parent as “B.G.”

provided a copy of her right to appeal. At the same time, DCS provided Mother with a copy of the *Criteria & Procedures for Termination of Parental Rights*.

In an order entered November 29, 2005, the juvenile court found that there was clear and convincing evidence that E.E.S. was dependent and neglected. Mother did not appeal this finding.

On April 11, 2006, DCS transported Mother for an alcohol and drug assessment. She admitted to falsifying her first urine sample. A second urine drug screen was positive for marijuana, cocaine, and opiates. Following this, Mother refused to participate in substance abuse treatment, admitting that, if she had been screened, she would have tested “dirty.” DCS tried to assist Mother by setting up services to meet her needs, but she failed to take advantage of these opportunities. Mother refused to follow through with her appointments and medication. On occasion, Mother even refused to open the door when the DCS case manager came to her home.

A permanency plan hearing was held on July 19, 2006; Mother failed to attend. The order entered following that hearing reflected that “Mother is not in compliance in that she has not completed substance abuse treatment, had [sic] not cooperated with services for the child, and visits only sporadically.”

On February 16, 2007, DCS filed a petition seeking to terminate Mother’s parental rights to E.E.S. DCS alleged, in relevant part, that

[i]t is in the best interest of [E.E.S.] and the public that this proceeding be brought, that all of the parental rights of Respondent [V.D.H.] to this child be forever terminated, and that the complete custody, control and guardianship of the child be awarded to the State of Tennessee, Department of Children's Services, with the right to place him for adoption and to consent to such adoption in loco parentis.

(Underlining in original). Mother answered DCS’s petition, admitting essentially all of DCS’s allegations. Mother claimed, however, that she was receiving medication to deal with chronic depression, that she visited frequently and regularly with the child, and that she and her son had formed a strong bond. She requested that the juvenile court allow her additional time to demonstrate compliance with the permanency plan.

The termination petition was heard on June 6, 2007. Just before the trial began, Mother was served with an arrest warrant. The warrant was issued because Mother had failed to appear in another court as ordered. We note that one condition of the permanency plan was that Mother address her legal difficulties.

At the start of the termination trial, Mother stipulated that there were grounds to terminate her parental rights. She admitted that the child’s foster family was taking good care of her son.

Mother also acknowledged that even if she retained her parental rights, she believed that her son should live with his foster family instead of with her. Mother testified that she was now visiting the child three times a week or more. Although she had not obtained a divorce from Father, Mother noted that her boyfriend, with whom she was living in his home, drove her to the visits. She admitted that she was unemployed and uninsured with no apparent source of income. Mother claimed to be going to Cherokee Health, and asserted that she could not pay to clear up her legal woes because she needed any money she earned to purchase insulin. According to Mother, her health had played a significant role in her lack of visitation with her son. On cross-examination, however, Mother admitted that she had not yet seen a medical doctor at Cherokee Health. Mother expressed her hope that she could continue to see her son, even if her parental rights were terminated.

The DCS case manager testified that the child was making good progress in school and was doing excellently with his foster parents, who wanted to adopt him. The case manager also related that Mother had done very little to complete the requirements of her permanency plan; her only accomplishment had occurred when DCS physically took her to an appointment and ensured that she stayed until it was completed. In the opinion of the case manager, Mother was incapable of taking care of herself or her son. The case manager indicated her belief that B.W. was willing to adopt E.E.S. and to allow Mother to visit:

They are family, which is the reason we put him there. And I'm sure that they will work something out, because [B.W.] has always been very close to [Mother] and her sister. . . . I'm sure she would be more than willing to work with [Mother] on that.

The case manager admitted that E.E.S. has bonded with and knows his mother: "He loves her, yes." However, it was observed by the case manager that while Mother could visit her son just about any time she wanted by making arrangements with her cousin, B.W., she apparently saw the child only once or twice a month. At trial, the case manager testified as follows:

As far as I can tell, she normally drops by. For awhile, she was visiting regular, and then it went to barely visiting him at all. And then she would go for short periods of time. Since we filed the TPR, she has started to go more and stay longer.

In response to questioning on cross-examination, the case manager was adamant that the interruptions in Mother's visitation were not related to the times Mother was suffering from physical health problems such as diabetes, pancreatitis, colitis, kidney stones, and Crohn's Disease, or her mental health and substance abuse issues.

From the bench, the trial court found that "[t]he State has clearly and convincingly proved [its] case" and "that it's in the best interest of this child that [Mother's] rights be terminated." In a

final order entered on June 14, 2007, the juvenile court terminated Mother's parental rights to E.E.S. Mother timely filed a notice of appeal on June 26, 2007.

II.

The sole issue presented for review is whether termination of parental rights is "in the best interest of a child who knows and has bonded with his mother."

III.

A parent has a fundamental right to the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993). However, such right is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). Parental rights may be terminated if there is clear and convincing evidence to justify termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988); *Tenn. Dep't of Human Servs. v. Riley*, 689 S.W.2d 164 (Tenn. Ct. App. 1984).

Termination proceedings are governed by statute in Tennessee. Parties who have standing to seek the termination of a biological parent's parental rights must first prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1) (Supp. 2007). Secondly, they must prove that termination of the parent's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2). Because the decision to terminate parental rights has profound consequences, courts must apply a higher standard of proof in deciding termination cases. Therefore, to justify termination of parental rights, the party seeking termination must prove, by clear and convincing evidence, the ground (or grounds) for termination and that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007).

As noted in *In re M.L.P.*,

[t]he heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established.

228 S.W.3d at 143 (citations omitted).

The standard of review is *de novo*, with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re Adoption of Self*, 836 S.W.2d 581, 582 (Tenn. Ct. App. 1992). Because of the heightened burden of proof required in

termination cases, *see* Tenn. Code Ann. § 36-1-113(c)(1), the appellate court “must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent’s parental rights.” *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). Furthermore, when a trial judge has seen and heard witnesses, especially where issues of credibility are involved, considerable deference must be accorded to the trial court’s factual findings. *See, e.g., McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995).

The Supreme Court requires that “before a parent’s rights can be terminated, there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated.” *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). The existence of any of the statutory grounds alleged in a petition establishes that a parent is unfit. *In re Valentine*, 79 S.W.3d at 546. Thus, DCS need not prove all of the grounds alleged. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000).

IV.

At the start of the trial of this matter, Mother candidly stipulated that there were grounds to terminate her parental rights. Accordingly, the only issue raised by Mother on this appeal is whether termination of Mother’s parental rights is in E.E.S.’s best interest.

To determine whether termination is in a child’s best interest, a court is to consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

As this court has noted, “[t]his list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent’s parental rights is in the best interest of a child.” *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The General Assembly has also stated that “when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.” Tenn. Code Ann. § 36-1-101(d) (2005).

The inquiry must address itself to the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger. Termination of a parent’s parental rights severs “forever all legal rights and obligations of the parent.” Tenn. Code Ann. § 36-1-113(l)(1). A parent whose rights are terminated has no right “thereafter to have any relationship, legal or otherwise, with the child.” *Id.*

In her answer, Mother admitted that it is in the best interest of E.E.S. to terminate her parental rights. Despite this admission, we have elected to consider Mother’s issue dealing, as it does, with the child’s best interest.

The proof clearly and convincingly establishes that termination is in the child’s best interest. Mother failed to avail herself of the services arranged by DCS to take care of her physical condition and mental health. Mother was arrested on the day of trial for failing to address a legal matter, the

resolution of which was required by the permanency plan. At the time of the trial, Mother, still married to Father, was living with a boyfriend. Mother was unemployed, uninsured, and otherwise financially unable to care for her son. Accordingly, despite reasonable efforts by DCS, Mother has failed to make a lasting adjustment to her circumstances such that return of her child would have been safe. *See* Tenn. Code Ann. § 36-1-113(i)(1), (2), (8). In particular, Mother's mental and/or emotional status would be detrimental to the child and Mother would be prevented from effectively providing safe and stable care and supervision for the child.

We further note that despite the fact E.E.S. was placed with a relative, Mother did not maintain regular visitation with the child. She increased her visits only after DCS filed its petition to terminate. *See* Tenn. Code Ann. § 36-1-113(i)(3). Additionally, the child was taken into custody because Mother had neglected him by leaving him unattended in a home in which she herself did not feel safe. *See* Tenn. Code Ann. § 36-1-113(i)(6). Further, Mother did not pay child support consistent with the guidelines promulgated by DCS pursuant to Tenn. Code Ann. § 36-5-101 (Supp. 2007). *See* Tenn. Code Ann. § 36-1-113(i)(9).

We find that a change of caretakers and physical environment would likely have a detrimental effect on the child's emotional, psychological, and mental condition. *See* Tenn. Code Ann. § 36-1-113(i)(5). E.E.S. has progressed with his foster family, who wants to adopt him. Even Mother admitted that the child's foster family was taking good care of him. Mother also acknowledged that even if her parental rights were not terminated, she still thought that the child should live with his foster family instead of with her.

Instead of disputing these factors, Mother stated that she was concerned that her cousin, B.W., might not be allowed to adopt E.E.S. and, as a result, the child might be placed with another foster parent or put up for adoption with another family. Mother contends that continuing her son in the current placement does not deprive him of a family setting, but simply continues the family setting that already exists, and that it is neither necessary nor in the manifest best interest of E.E.S. to terminate her parental rights at this time. Mother's argument, however, lacks merit because it improperly shifts the evaluation from the child's best interest to Mother's best interest. *See In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005) (whether termination is in the child's best interest must be viewed from the child's rather than the parent's perspective). While the parent's rights are the focus at the "grounds" stage, the best interest of the child becomes the paramount consideration after the court has determined that at least one ground for termination has been proved by clear and convincing evidence. *Id.* at 876.

We conclude that the evidence does not preponderate against the juvenile court's finding by clear and convincing evidence that termination of Mother's parental rights is in the best interest of E.E.S.

V.

For the foregoing reasons, we affirm the trial court's judgment and remand the case to the juvenile court for such further proceedings, if any, as may be required to enforce the juvenile court's judgment terminating Mother's parental rights to E.E.S. and for collection of costs assessed below, all pursuant to applicable law. The costs of this appeal are taxed against the appellant, V.D.H.

CHARLES D. SUSANO, JR., JUDGE